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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1941

314-674

# No. 628

McKESSON & ROBBINS, INC., McKESSON-STEWART-HOLMES DRUG, AND BLUMAUER FRANK DRUG, DIVISIONS,

*Petitioner,*

*against*

NATIONAL LABOR RELATIONS BOARD,

*Respondent.*

## PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA.

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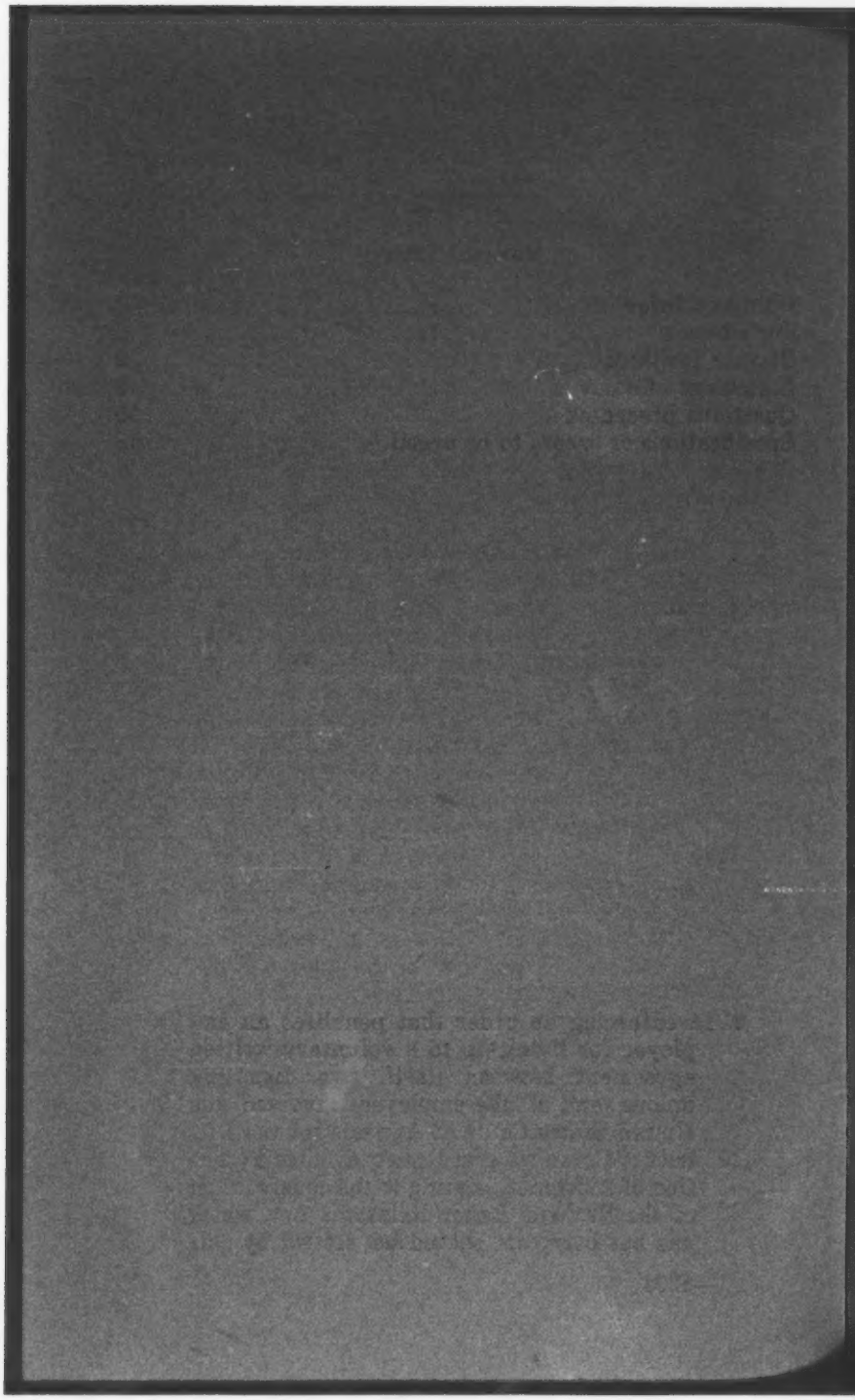

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**PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA.**

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*To the Honorable the Chief Justice and the Associate Justices of the Supreme Court of the United States:*

McKesson & Robbins, Inc., the petitioner herein, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the District of Columbia rendered on May 5, 1941 (R. 563), denying the petition of Warehousemen's Union, Local 117, International Brotherhood of Teamsters, Chauffeurs, Stablemen and Helpers of America, affiliated with the American Federa-

tion of Labor, to set aside a certain order of the National Labor Relations Board made on January 23, 1940, and granting to said Board its petition to enforce said order against the petitioner.

### Opinions Below.

The findings of fact, conclusions of law, and order of the Board are printed on pages 497-530 of the record, and are reported as 19 N. L. R. B. 778. The opinion of the United States Court of Appeals for the District of Columbia will be found in 121 F. (2d) 84 (Adv. Sheets). It will also be found on pages 543-559 of the record.

### Jurisdiction.

The jurisdiction of this Court is invoked under Section 240 of the Judicial Code, as amended by the Act of February 13, 1925 (28 U. S. C. A., Section 347), Section 10 (e) of the National Labor Relations Act (29 U. S. C. A., Section 160 (e)), and under General Rule 38 of this Court, Section 5, Subdivision c.

### Statute Involved.

The statute involved is the National Labor Relations Act, 29 U. S. C. A., Section 151, *et seq.* The pertinent provisions of the Act are Sections 2 (6) and (7), 7, 8 (1) and (3), and 10 (e) and (f). Because of the length of these provisions they are set forth in an appendix.

### Statement of Facts.

1. The petitioner, McKesson & Robbins, Inc., hereinafter called "McKesson", is a corporation organized under and by virtue of the laws of the State of Maryland, with a principal place of business at 155 East 44th Street, New York, New York. It owns and operates a large number of whole-

sale warehouses in different localities in the United States, each warehouse being called a division and being under local management (R. 503). Included among such warehouses is one in Seattle, Washington, called the McKesson-Stewart-Holmes Drug Division, hereinafter called "McKesson-Stewart". On or about October 1, 1937, McKesson purchased the Seattle warehouse and assets of the Blumauer Frank Drug Co., and for a short time thereafter operated the said Seattle warehouse as its Blumauer-Frank Drug Division, sometimes hereinafter called "Blumauer Frank". It discontinued the operations of Blumauer Frank on or about November 17, 1937 (R. 503).

On December 8, 1938, subsequent to the hearings hereinafter referred to before the National Labor Relations Board, hereinafter called the "Board", which hearings were held on September 19-22, inclusive, 1938, but before the issuance of the Board's order herein, the United States District Court for the Southern District of New York, upon petition by McKesson for reorganization under Chapter X of the Bankruptcy Act (52 Stat. 840, 11 U. S. C. (Supp. V), Sec. 501), issued an order appointing William J. Wardall Trustee of the Estate and all the assets of McKesson, and staying all suits and proceedings against McKesson pending final decree in the reorganization proceedings. The Board ruled that the proceedings herein were not affected by the District Court's restraining order, and none of the parties have questioned the Board's ruling in this respect. On July 1, 1941, reorganization proceedings having been completed, and pursuant to due approval thereof by the District Court, McKesson was revested in its estate and assets.

2. International Longshoremen & Warehousemen's Union, Local 9, District 1, hereinafter called "Local No. 9", is a labor organization presently affiliated with the Congress of Industrial Organizations, hereinafter called the "C. I. O.". It admits to its membership all employees of McKesson-

Stewart engaged in work in and about the warehouse (R. 503-4). Local No. 9 was formed in June, 1937, by the officers and certain members of Weighers, Warehousemen & Cereal Workers, Local 38-117, of the International Longshoremen's Association, hereinafter called "Longshoremen", when certain Pacific Coast locals of such Association gave up their affiliation with the American Federation of Labor, hereinafter called the "A. F. of L." and became affiliated with the C. I. O. (R. 504).

3. Warehousemen's Union, Local 117, International Brotherhood of Teamsters, Chauffeurs, Stablemen & Helpers of America, hereinafter called "Teamsters", is a labor organization chartered by the International Brotherhood of Teamsters, Chauffeurs, Stablemen & Helpers of America, which is affiliated with the A. F. of L. It too admits to its membership all employees of McKesson-Stewart engaged in work in and about the warehouse (R. 504). It was formed in October or November, 1936 (R. 504).

4. In October, 1936, Longshoremen represented a large number of employees in both McKesson-Stewart and the Seattle plant of Blumauer Frank Drug Co. (R. 240-1, 504), and on December 29, 1936, the Managements of the two plants agreed with it upon a statement of policies governing their labor relations (R. 504). Around this time, however, Teamsters were making efforts to organize these same employees (R. 243-4, 396, 505), and in order to persuade these employees to join it, it picketed the plants and prevented their trucks from running (R. 504). As a result, the two plants closed on January 7, 1937, and remained closed until June 9, 1937, when the so-called "Truce Agreement", hereinafter referred to, was entered into. In February, 1937, the Executive Council of the A. F. of L. extended the jurisdiction of Teamsters so as to cover persons employed in warehouses away from the marine docks and actual waterfront (R. 505).

5. This jurisdictional controversy between the Teamsters and the Longshoremen also involved three other Seattle warehouses, the plants of the West Coast Wholesale Drug Co., the West Coast Kalsomine Co., and the Bemis Bag Co., where events took approximately the same course as noted above (R. 505).

6. Between the dates of January 7, 1937, and June 9, 1937, various attempts were made to negotiate a settlement of the controversy between the two unions, and a Citizens' Committee, composed of business and professional men of Seattle, was formed to aid in the negotiations. It finally was successful in negotiating, on June 9, 1937, what is herein called the "Truce Agreement", providing (1) that the five plants would reopen under guarantees by both unions that the workers would be permitted to return to work, and the plants' products hauled and delivered without interference, (2) that the employees would return to work under their then union affiliations, and that Longshoremen would appeal from the aforesaid February decision of the Executive Council of the A. F. of L. extending Teamsters' jurisdiction to the October convention of the A. F. of L. to be held in Denver, Colorado, (3) that both unions agreed to be bound by the final decision of said convention, (4) that if Longshoremen did not so appeal, both unions agreed to abide by the decision of the Executive Council, and (5) that the Truce Agreement would become effective when signed by the officers of the unions, and that the signing of the Truce Agreement by the employees would entitle each one signing to the same position which he had held before the plant in which he worked had ceased operations. A copy of the Truce Agreement appears in the record at pages 173-4.

7. Pursuant to paragraph numbered 1 of the Truce Agreement, McKesson opened its McKesson-Stewart Division at

great expense to itself (R. 398). McKesson did not sign such Agreement, but did agree to be bound by it (R. 397). Pursuant to paragraph numbered 5 of such Agreement the employees at both McKesson-Stewart and the Seattle warehouse of the Blumauer Frank Drug Co. each signed the following statement annexed to a copy of the Truce Agreement:

> "The undersigned employees of (here was inserted the name of the particular company) fully understanding the within agreement, hereby approve the same and agree to be bound thereby."

Throughout these proceedings there has been frequent reference made to a so-called "Supplemental Agreement", which was a provision insisted upon by Dave Beck, the International Organizer of the Teamsters' Brotherhood on the West Coast (R. 506), before his name was signed to the Truce Agreement. Said Supplemental Agreement read as follows:

> "Supplementing the foregoing agreement, we do hereby agree that if the International Longshoremen's Association shall sever its connection with the American Federation of Labor, we will nevertheless obey the jurisdictional decision of the American Federation of Labor and if the decision of the Executive Council is not reversed, we will immediately make application for membership in the Teamsters' Union."

and was to be signed by the unions and individual employees.

As to this Supplemental Agreement, it is in issue whether it was agreed to by all parties. However this be, the copies of the Truce Agreement delivered to McKesson and to the Blumauer Frank Drug Company omitted the Supplemental Agreement, presumably by accident (R. 508).

8. When Longshoremen signed the Truce Agreement, there was under serious consideration among certain of its Pacific locals, including the local having jurisdiction of the employees in question, i. e., Local 38-117, the question whether they would sever their A. F. of L. affiliation and affiliate with the C. I. O. (R. 252-3, 273). Such locals made no qualification, exception or provision in the Truce Agreement for this eventuality, the Supplemental Agreement having emanated from Teamsters. It appears further that one of the provisions in one of the Longshoremen's proposals to settle the dispute, preceding the Truce Agreement, provided for a transfer of members between the unions pursuant to final settlement (R. 505-6), and that employees at the other three plants caught with McKesson in the jurisdictional controversy, and which employees were members of Longshoremen, signed the Supplemental Agreement (R. 271).

9. In July 1937 certain Pacific Coast locals of Longshoremen voted to affiliate with the C. I. O., and thereafter the C. I. O. issued a charter to Local No. 9, composed of the officers and those members of the Longshoremen's local having jurisdiction of the employees in question, i. e. Local 38-117, who had voted to withdraw from the A. F. of L. The International Longshoremen's Association has never severed its affiliation with the American Federation of Labor, has participated in all its conventions, and participated in the October 1937 convention when the aforesaid decision of the Executive Council was confirmed. Moreover, not all of the members of the Longshoremen's local having jurisdiction of the employees in question, i.e. Local 38-117, withdrew from the A. F. of L. (R. 109, 136, 508).

10. Despite the terms of the Truce Agreement, about September 27, 1937, Local No. 9 distributed, among the warehouse employees of McKesson-Stewart and the em-

ployees at the Seattle warehouse of Blumauer Frank Drug Co. cards designed to secure their authorizations for Local No. 9 to represent them in collective bargaining and about the same time the Employees' Relations Committee of Local No. 9 at McKesson-Stewart wrote McKesson that it desired to begin bargaining negotiations (R. 508-9).

11. On October 13, 1937, the A. F. of L. Convention in Denver adopted a supplemental report of the Executive Council to the effect that it had extended the jurisdiction of Teamsters to persons employed in warehouses located away from marine docks and the actual waterfronts (R. 509), thus confirming the Executive Council decision aforesaid. On October 27, 1937, McKesson, at the request of Teamsters, delivered to its employees a letter, signed by the Secretary-Treasurer of Teamsters, informing them of such action at the Denver Convention, and stating they would be expected to live up to the terms of the Truce Agreement, including transferring their membership into Teamsters (R. 509). Thereafter, acting in accordance with its understanding of the Truce Agreement which it regarded as obligating it to take such action, on or about November 15, 1937 McKesson signed closed shop agreements with Teamsters for the McKesson-Stewart and Blumauer Frank divisions (R. 510), and put them into effect immediately. The West Coast Wholesale Drug Co. did likewise.

12. On October 28, 1937, subsequent to the A. F. of L. Convention decision and to the notification of the employees thereof, Local No. 9 filed five separate Representation petitions with the Regional Director of the Board for the 18th Region, at Seattle, Washington, alleging that questions had arisen concerning the representation of employees of the five plants, respectively, and requesting investigations and certifications of representatives for the purposes of collective bargaining. In such petitions Local No. 9

claimed practically 100% of the employees in question as members (R. 274). On these petitions, the Board held hearings from November 18 through November 22, 1937, and therein had presented to it, and considered, all of the facts surrounding the execution of the Truce Agreement, and the closed shop contracts and alleged discharges thereunder. The unfair labor practice charges, which initiated these proceedings and which turn only on the making of such closed shop contracts and the alleged discharges thereunder, were first filed on November 23, 1937 (R. 498) and were later sustained upon the very same evidence, the parties indeed having stipulated, for the purposes of these proceedings, that a large portion of the testimony in the Representation hearings be here accepted as testimony herein (R. 223, 239-418).

13. A "Decision and Direction of Elections" in the five Representation proceedings was made by the Board on February 4, 1938, same being 5 N. L. R. B. 70. In said decision the Board found that the closed shop contracts did not constitute a bar to its ordering an election 5 N. L. R. B. 81. Further, the Board ordered an immediate election for the reasons best stated in its own language, namely:

*5. N. L. R. B. 85:*

"Local No. 9 also introduced in evidence lists of its members employed by each of the companies. A comparison of the names on the membership lists and the names on the lists introduced in evidence of the persons on the pay rolls of the five companies indicates that a majority of the employees in the appropriate unit in each company were members of Local No. 9 as of September 1937.

"*The record, however, indicates that a substantial number of the employees of McKesson-Stewart who were members of Local No. 9 and had signed pledge cards, applied on November 17, 1937, for membership in*

> *the Teamsters' Union.* Although it does not appear clearly, there is evidence indicating that a similar occurrence probably took place among the employees of West Coast Drug. *This indicates the possibility of a change in the desires of the employees in McKesson-Stewart and West Coast Drug concerning representation. Indeed, in view of all the circumstances present in the instant proceedings, we feel that there is doubt as to the present desire of the employees of each of the five companies relative to representation. We find, therefore, that the question which has arisen concerning representation can best be resolved by means of an election by secret ballot.*" (Italics added.)

and the Board made eligible to vote therein only such employees who were on the payroll the week of October 28, 1937, a date prior to the making of the closed shop contracts and any alleged discharges thereunder.

14. Pursuant to such "Decision and Direction of Elections", elections were held with the following results:

a. *Bemis Bag Co.* Of its 155 eligible voters, and from 137 ballots cast, Local No. 9 received 49 votes (5 N. L. R. B. 91-92). As to this Company, Local No. 9's petition was therefore dismissed.

b. *West Coast Kalsomine Co.* Of its 22 eligible voters, and from ballots cast, Local No. 9 received 12 votes and Teamsters 10. Local No. 9 was here certified as bargaining agent (5 N. L. R. B. 92-94).

c. *West Coast Wholesale Drug Co.*, which also executed a closed shop contract with the Teamsters (5 N. L. R. B. 70, 81). Of its 11 eligible voters and ballots cast, Local No. 9 received 6, and Teamsters 5, votes. There was however no certification here, it appearing that on February 26, 1938, all but one of the employees signed a petition revoking any authority theretofore given Local No. 9 and

requesting the Teamsters be declared the sole bargaining agent of the employees, or in the alternative, that the Board order a new election. On February 7, 1939, the Board issued a second "Direction of Elections", among the same employees as before. In this election, Teamsters secured 10, and Local No. 9, 1, votes, whereafter Teamsters was herein certified bargaining agent. The foregoing proceedings appear in 11 N. L. R. B. 40-44.

d. *McKesson-Stewart and the Seattle Warehouse of Blumauer Frank Drug Co.* On February 14, 1938 the Board amended its "Decision and Direction of Elections" of February 4, 1938 (5 N. L. R. B. 88), by ordering but one election to be held among the warehouse employees of both the above noted warehouses. This made for 63 eligible voters, inclusive of approximately 21 Blumauer Frank employees (5 N. L. R. B. 73), of whom 15 join as complainants in the unfair labor charges herein in question and remain members of Local No. 9. Said amendment, however, itself notes the discontinuance of operations at the Blumauer Frank warehouse, and at the time of the hearings herein, there were only about 40 employees engaged in and about McKesson-Stewart's warehouse (R. 503, 515), and the Board has recognized this fact in its order herein, wherein it merely requires these Blumauer Frank employees to be placed upon a preferential list until employment be available.

Of the total of 63 eligible voters so resulting, and from 60 ballots cast, Teamsters received 32, and Local No. 9, 27, votes, and 1 was void. The election was by secret ballot, was conducted in a manner conforming to the directions of the Board, with full opportunity accorded all parties to participate therein and to make challenges, and was certified to by authorized observers for both unions and the Regional Director, acting as agent for the Board in the

matter, as having been fairly and impartially conducted (R. 198-202). Said Regional Director further in his "Intermediate Report upon Secret Ballot", recommended that Teamsters be certified as the exclusive bargaining agency for all the warehouse employees of McKesson's Stewart-Holmes and Blumauer Frank Drug Divisions (R. 201), despite the fact he then had before him the original unamended alleged unfair labor practice charges herein in question, which were filed on November 23, 1937 (R. 209). No action has, however, been taken by the Board on this election or recommendation pending a determination of the issues herein (R. 514).

15. Upon said alleged unfair labor charges, as amended on July 5, 1938, the Board, by its said Regional Director issued two complaints dated July 13, 1938, against McKesson, both alleging, one with respect to the McKesson-Stewart and one with respect to Blumauer Frank, that McKesson had engaged in and was engaging in unfair labor practices affecting commerce, within the meaning of sections 8 (1) and (3) and 2(6) and (7) of the National Labor Relations Act, hereinafter called the "Act", with respect to its employees at its said divisions. The complaints are set forth in the record, at pages 203, and 211. As the U. S. Court of Appeals for the District of Columbia recognized, these charges stand or fall upon the sole issue of whether the closed shop contracts of November 15, 1937 were valid. If the contracts stand, the unfair practices found by the Board to have been committed by McKesson, and which were only putting the contracts in effect, were legal.

16. On or about July 28, 1938, McKesson filed an answer to both complaints, in which it admitted the signing of the closed shop agreements, but otherwise denied all the material allegations of the complaints relating to unfair labor

practices. The answer further alleged, among other things, that the closed-shop agreements were executed pursuant to the terms of the Truce Agreement, by the terms of which each and every one of the employees at McKesson-Stewart and Blumauer Frank had agreed to be bound (R. 170).

17. Pursuant to notice, a hearing was held at Seattle, Washington, on September 19, 20, 21 and 22, 1938, before Dwight W. Stephenson, the Trial Examiner duly designated by the Board. At the outset of the hearing and again at the close of the Board's case counsel for McKesson made motions to dismiss the complaints, rulings on which were reserved by the Trial Examiner (R. 161), (R. 500-501). The motions were based on the following grounds (R. 20):

> "first, that, on the record in these cases it appears that McKesson is guilty of no unfair labor practices; second, that the entire controversy has been before the Board, and once decided, and they ordered an election, which was held; and third, that the unions,—the complaining union here, and the other union as well,—and the employees are estopped from pressing these charges of unfair labor practices by their previous actions."

McKesson's argument before the Board was in line with this position.

18. On December 24, 1938 (R. 469), the Trial Examiner filed his "intermediate Report," on these charges, in which he found that McKesson had been guilty of unfair labor practice charges and recommended that an order issue directing reinstatement of the McKesson-Stewart employees with full back pay, and reinstatement, to the extent possible, of Blumauer Frank employees. To the findings of fact, conclusions of law and recommendations in said Report contained, McKesson duly filed exceptions (R. 471) and thereafter argued before the Board such exceptions. On

January 23, 1940 the Board rendered the "Decision and Order" here in question.

19. In said "Decision and Order," the Board disagreed with the Trial Examiner in several important respects. It did, however, order McKesson to reinstate the McKesson-Stewart employees, with back pay only from such date as was five days after McKesson received such "Decision and Order," for the reason that (R. 526) "the legal rights and obligations of the parties under the Truce Agreement and the Labor Relations Schedules (closed shop agreements) have been involved in doubt and the respondent's (McKesson's) course of action with regard to the persons discriminated against appears to have been predicated upon an honest reliance on what it conceived to be the proper interpretation of the Truce Agreement." The Board also ordered the Blumauer Frank employees placed upon a preferential list.

20. In said "Decision and Order," the Board completely ignored the results of the election of February 18, 1938, ordered by it in the Representation proceedings as the best means of resolving the doubt as to the then desires of the employees, despite the fact there was no new evidence before it of unfair labor practices committed prior or subsequent to the close of the Representation hearings, or any evidence of attempts to influence the election, or that the employees were dissatisfied with its result.

21. In said "Decision and Order," the Board concluded that the Truce Agreement was a means of adjusting a dispute between two A. F. of L. organizations, and that the parties did not intend it to be binding where one of the organizations left the A. F. of L. (R. 518).

2. On April 1, 1940, Teamsters, pursuant to Section 10 (f) of the Act, filed with the U. S. Court of Appeals for the

District of Columbia its petition to review and set aside the aforesaid order. On May 3, 1940, the Board filed its answer to the petition and in said answer requested enforcement of its order against McKesson. The decision of the court which petitioner seeks to review was rendered on May 5, 1941, said decision, by majority opinion, denying Teamsters' petition and granting, with modifications, the Board's request for enforcement. The court held that the Board was correct in its interpretation of the Truce Agreement, and that, as matter of law, the Truce Agreement was not legally effective to make Teamsters the representative of McKesson's employees. The court further held that the Board was not bound by the election and could disregard its results. And the court finally held that there was substantial evidence to sustain the Board's finding concerning the existence of unfair practices.

Groner, C. J. dissented on the ground that to affirm the Board's order was, first, to designate a representative of the employees contrary to their expressed preference, and, second, to penalize the employer for living up to a voluntary written agreement between itself and two disputing unions. He characterized the Board's action in ordering and holding an election and then repudiating the result, as arbitrary, and without rhyme or reason under the evidence.

23. Petitions for rehearing, filed by Teamsters and McKesson, respectively on May 20, 1941, were denied on June 21, 1941 (R. 598).

**Questions Presented.**

1. Whether the proviso of Section 8 (3) of the Act validates an agreement supported by ample consideration whereby all the employees involved in a jurisdictional controversy agree in advance, individually and through their unions, to the subsequent execution by the Employer of a

closed shop agreement with such of two contending unions as is determined, pursuant to the terms of such agreement, to have jurisdiction over them, to be entitled to their membership and to be their bargaining agent?

2. Whether employees may, for ample consideration and to settle a jurisdictional controversy that had shut down their places of work, contract, individually and through their unions, to give their consent to the making, subsequently, of a closed shop agreement between their employer and the union determined, by arbitration, to have jurisdiction over them and to be entitled to their membership, so as to constitute such chosen union as their appropriate collective bargaining unit at the time the contract is made, within the meaning of the proviso of Section 8 (3) of the Act?

3. Whether, where employees have entered into a binding agreement, individually and through their unions, to become members of such union as named arbitrators determine is entitled to their membership, as a result of which agreement other parties, including their employer, have acted to their detriment, they may, if the majority thereof so desire, disregard at will the terms of such agreement?

4. Whether, where employees have entered into a binding agreement, individually and through their unions, to become members of such union as named arbitrators determine is entitled to their membership, to which agreement their employer is a party, together with others, such employer, if acting in reliance upon such agreement and being required by such others to fulfill its obligations under such agreement, can be guilty of unfair labor practices thereby, even if in fact the majority of its employees have refused to abide by such agreement, unless and until the employees have taken, as they had ample time to, steps to have the Board annul such agreement?

5. Whether individual contracts entered into with each and every employee, with the consent of the two unions to which they belong and which are contending for jurisdiction thereover, whereby such employees have agreed to become members of such of the two unions as named arbitrators determine is entitled to their membership, are legal and valid?

6. Whether the due process provision of the Fifth Amendment to the Federal Constitution bars the Board from proceeding upon charges of unfair labor practices filed by a union, prior to its, the Board's decision in Representation proceedings involving the same controversy and the same facts alleged to constitute unfair practice, in which decision, based on such facts, the Board saw fit only to order an election to be held as the best means to resolve the controversy, and which election was fairly and impartially conducted, and resulted in the union requesting certification and filing the unfair labor practice charges losing the election?

7. Whether the Board is unlawfully exercising its powers where, after ordering an election to be held as the best means to resolve a jurisdictional controversy, and with full knowledge of all the facts, it, thereafter, and after such election is fairly held and the result fairly determined, and such result is adverse to the union requesting certification, without rhyme or reason, repudiates its own action and sets aside the election, and proceeds to hear the same facts and to determine thereon that the losing union and its members had been victims of unfair labor practices?

8. Whether an uncoerced election fairly held and determined on February 18, 1938, but among employees on the payroll as of October 28, 1937, and resulting in a majority vote for an A. F. of L. union, can validate a closed shop agreement made by the employer with said A. F. of L. union on November 15, 1938?

**Specifications of Errors to be Urged.**

The U. S. Court of Appeals for the District of Columbia erred:

1. In holding the closed shop contract of November 15, 1937, invalid, and the actions taken thereunder as unfair labor practices.

2. In holding the Truce Agreement ineffective upon withdrawal by one of the unions from the A. F. of L. and consequent affiliation by such union with the C. I. O.

3. In ruling that the Board was not bound by the results of the election held on February 18, 1938.

4. In ruling that the election held on February 18, 1938, did not validate the closed shop contract of November 15, 1937.

5. In holding that the finding of the Board that the election of February 18, 1938, was invalid because coerced was supported by substantial evidence.

6. In enforcing an order that penalizes an employer for living up to a voluntary written agreement between itself and two disputing unions.

7. In upholding arbitrary and unlawful exercise of power on the part of the Board.

8. In ruling that the proviso of Section 8 (3) of the Act did not permit employees to contract, in advance to the date thereof, and in order to settle a jurisdictional controversy between two contending unions, to give their binding consent to the execution of their employer of a closed shop contract with such of the unions as was thereafter, pursuant to the terms of the contract, determined to be entitled to the employees' membership.

9. In invalidating individual agreements entered into by employees, with the consent of their unions, designed to settle a jurisdictional controversy between their unions.

10. In ruling contracts between employers and employees, acting through their unions, abrogable at any time at the will of a majority of the employees.

**Reasons for Granting the Writ.**

1. In invalidating individual agreements entered into by employees, with the consent of their unions, designed to settle a jurisdictional controversy between their unions, the U. S. Court of Appeals for the District of Columbia erroneously decided a question of substance relating to the construction of the National Labor Relations Act, which has not been, but should be, settled by this Court. Further, said court has failed to give proper effect to the decision of this Court in *N. L. R. B.* v. *Jones & Laughlin Steel Corp.* (1937), 301 U. S. 1, 57 S. Ct. 615, to the effect that the National Labor Relations Act does not prevent individual contracts with employees not designed to forestall or limit union activities.

2. In enforcing an order that penalizes an employer for living up to a voluntary written agreement between itself, two disputing unions and all the employees involved, the U. S. Court of Appeals for the District of Columbia erroneously decided a question of substance relating to the construction of the National Labor Relations Act, which has not been, but should be, settled by this Court. Further, such enforcement has the direct effect of defeating the principal purposes of the Act, which was "to avoid industrial strife by providing an orderly process of settling controversies."

3. In upholding the order of the Board herein the U. S. Court of Appeals for the District of Columbia has sanctioned such an arbitrary and unlawful exercise of power on

the part of, and course of procedure by, the Board, as to call for an exercise of this Court's power of supervision.

4. In holding the closed shop agreements of November 15, 1937, invalid, and the actions taken thereunder as unfair labor practices, the decision of the U. S. Court of Appeals of the District of Columbia is in conflict with the decision of the Circuit Court of Appeals for the Sixth Circuit in *N. L. R. B.* v. *Electric Vacuum Cleaner Co., Inc.* (June 6, 1941), 120 F. (2d) 611, and the decision of the U. S. Court of Appeals for the Fifth Circuit in *Peninsular & Occidental Steamship Company* v. *N. L. R. B. et al.*, 98 F. (2d) 411, Cert. Den. 305 U. S. 653, 59 S. Ct. 248.

5. In holding the discharges herein improper, the United States Court of Appeals for the District of Columbia has failed to give proper effect to the decision of this Court in *N. L. R. B.* v. *The Sands Mfg. Co.* (1939), 306 U. S. 332, 59 S. Ct. 508.

WHEREFORE, your petitioner, referring to the annexed brief in support of the foregoing reasons for review, respectfully prays that this Honorable Court issue a writ of certiorari directing the U. S. Court of Appeals for the District of Columbia to certify and send to this Court a full and complete transcript of the record herein, to the end that the said cause may be reviewed and determined by this Court, as provided by law, and that the judgment of the U. S. Court of Appeals for the District of Columbia may be reversed, and that your petitioner may have such other and further relief as to this Honorable Court may seem just.

McKESSON & ROBBINS, INCORPORATED,
*Petitioner,*

By CLINTON ROBB,
FREDERIC WINGERSKY,
A. J. BRONSTEIN,
*Its Attorneys.*

Dated: September —, 1941.

## BRIEF.

**1. In invalidating individual agreements entered into by employees, with the consent of their unions, designed to settle a jurisdictional controversy between their unions, the United States Court of Appeals for the District of Columbia erroneously decided a question of substance relating to the construction of the National Labor Relations Act, which has not been, but should be, settled by this Court. Further, said court has failed to give proper effect to the decision of this Court in N. L. R. B. v. Jones & Laughlin Steel Corp. (1937), 301 U. S. 1, 57 Supreme Court 615, to the effect that the National Labor Relations Act does not prevent individual contracts with employees not designed to forestall or limit union activities.**

With respect to this contention, McKesson respectfully calls to the attention of this Court the history of the jurisdictional controversy between Local 38-117 of the Longshoremen, and Teamsters, that from the first of the year of 1937 until the signing of the Truce Agreement kept the five plants hereinbefore referred to closed. Nothing will be gained by repeating the story herein. It is set forth fully in the Board's decision reported in 5 N. L. R. B. 70, at pages 75-77, and it is repeated in the Board's decision herein (R. 505-507). It cannot be controverted but *that this has not been a case of interference by management with the rights guaranteed to employees by the Act. This has been a jurisdictional controversy between two unions, in which controversy the employer was the victim.* The Board so recognized, and so did the court below, the court saying:

> "It is but fair to say that until August, 1937, McKesson stood in the cross fire of battle between contending unions, victim of the struggle rather than combatant. As far as the record shows, it maintained a

hands-off policy as long as the fight was confined to the ranks of the A. F. of L., both in the Seattle plants and elsewhere."[1]

As the record also discloses (R. 263, 448) many attempts were made from time to time to settle this jurisdictional controversy between the two unions, the negotiations culminating in the Truce Agreement, apparently the only type of agreement the parties could determine upon to settle a disastrous civic problem.[2] It was a valid agreement under Washington law and it created valid rights and obligations. See *Gord* v. *F. S. Harmon & Company* (1936), 188 Wash. 134, 61 Pac. (2d) 1294, at 1296. It was designed to settle, once and for all, and according to the decision of the A. F. of L. Convention, this jurisdictional controversy.[3] For this

[1] The court could well have gone further, and placed such date much later, but for an unwarranted assumption of fact. In the record, at pages 187-197, appears a copy of a Memorandum of Working Agreement made and entered into on August 18, 1937 by and between McKesson and the A. F. of L., acting for itself and its affiliated organizations and member local unions, in order to comply with the Act. The court assumed this Working Agreement was entered into because of the withdrawal of the certain Pacific locals of Longshoremen, including Local 38-117, from the A. F. of L., and made capital of the fact there was no such similar agreement with the C. I. O. In fact, said Working Agreement was entered into upon the theory that the A. F. of L. was, nationally, the representative of a majority of McKesson's employees at all its divisions and to comply with section 9 (a) of the Act. Important here is the fact the record discloses nothing to indicate McKesson knew of the change of affiliation from A. F. of L. to C. I. O. here involved prior to September 27, 1937 (R. 178-9) which was subsequent to the execution of the Working Agreement, or that the Working Agreement was in any way caused or affected by this controversy.

[2] So disastrous to the city was the continuance of the controversy that a Citizens' Committee was formed to aid in its settlement. The Citizens' Committee consisted of a group of representative citizens who "tried to meet both sides and work out some solution of the disputes" (R. 376). It comprised D. W. Bowen, president of Puget Sound Sheet Metal Works, C. H. Howell, vice-president of the Seattle First National Bank, Victor Elfendahl, vice-president of Skinner & Eddy, S. S. Sayres, president of the American Automobile Corp., Nathan Eckstein, president of Schwabacher and Company, and R. J. Venables, attorney (R. 391-2).

[3] See letter of Citizens' Committee published on November 13, 1937 (R. 181).

reason, all employees were required to sign it, so as to be bound regardless of what happened to their unions.

Yet despite these facts, the Board and the court disregarded the Truce Agreement, and further penalized the Employer for living up to its obligations thereunder. Does this mean then that unions contending for jurisdiction cannot settle their differences by mutually agreeing upon certain persons to make a determination of such differences? Does this mean that arbitration to determine jurisdictional controversies is unenforceable? For if an employer, faced with such controversies, as also with a settlement thereof, as herein developed, must at the same time realize that a change of union affiliation by his employees will make any of his actions under such settlement improper, even if he faithfully performs his part of the bargain, and such change of affiliation being most natural for the losing union, it has no alternative but to allow the controversy to continue, to the great loss of its employees. McKesson would have stayed closed here, had it supposed the Truce Agreement was not a permanent adjustment of the problem (R. 398-9), or had it even deemed it possible its actions thereunder, at least until after the Board barred such action, could be deemed unfair labor practices and productive of orders such as are here in question. It is submitted that both the Board and the court are in error, and that such an agreement as the Truce Agreement is legal and valid, and action thereunder proper, unless and until at least the Board, in the exercise of the powers granted to it by the Act, annuls the same, whether because no longer indicative of the desires of the employees involved, or however otherwise. And if this be so, an employer is warranted in becoming a party to such agreements, and thus the fundamental purpose of the Act, to protect interstate and foreign commerce from interruption

and obstruction caused by industrial strife, will best be served.

Both the Board and the court reached their conclusion as much upon the basis that the Truce Agreement, as a matter of interpretation, was not intended to be binding if Local 38-117 left the A. F. of L., as for any other reason. Never was an interpretation so wrong, but even if right, it still is submitted that where, as here, both the Board and the court recognize that McKesson honestly regarded itself as obligated to take action under the Truce Agreement, an agreement as to which "the legal rights and obligations of the parties have been involved in doubt" (R. 526), a charge of unfair labor practices because of actions thereunder cannot be sustained, but only an election ordered to determine the desires of the employees. (See dissenting opinion of Groner, C. J.) And this indeed must have been the reasoning of the Board when, in the Representation proceedings, it ordered such election to be held.

We repeat, however, never was an interpretation so wrong. The record conclusively and overwhelmingly demonstrates that all parties, inclusive of Local 38-117, intended the Truce Agreement to be binding even if Local 38-117 left the A. F. of L. *As to McKesson,* it would not have opened, save for the fact it deemed the controversy finally and fully settled (R. 398-9). *As for the Citizens' Committee,* even prior to the Representation proceedings and subsequent to McKesson's receipt of the September 27, 1937 letter from Local No. 9's members in its McKesson-Stewart plant, such Committee addressed a letter to McKesson urging it to abide by the terms of the Truce Agreement. The letter appears in the record at pages 176-8. After the Representation petitions were filed, the Committee interviewed Mr. Bradshaw, business agent of Local No. 9 (R. 21) and tried then to get him "to turn the membership over to the Teamsters" and "urged the performance or carrying

out of the terms of the" Truce Agreement (R. 283). Failing, it published the November 13, 1937 statement (R. 181), deploring Local No. 9's breach of contract, etc. *As to the three other companies,* it was testified to on their behalf, and there is no contradiction in the record, that it was necessary that the controversy be "finally settled" before they reopened (R. 386) and they "never assumed that there would be any further difficulty" (R. 386). Indeed, as heretofore noted, on November 18, 1937, West Coast Wholesale Drug Co. also entered into a closed shop contract with Teamsters. *As to Teamsters,* it demanded McKesson live up to the terms of the Truce Agreement on penalty of closing it down (R. 401) and McKesson, after consulting the Citizens' Committee, so did. *As to the employees,* men of mature years, the Board itself notes (5 N. L. R. B. 85) "a substantial number of employees of McKesson-Stewart who were members of Local No. 9 and had signed pledge cards, applied on November 17, 1937, for membership in the Teamsters' Union." Some testified that they went back to work with the understanding they would live up to the Truce Agreement and that they went A. F. of L.,, when it was given jurisdiction, because of such agreement (R. 136). Their vote in the election as expressing such preference is unanswerable. *And as to Local No. 9,* attention is called to the testimony of Mr. Bradshaw on page 273 of the Record, and his further testimony on page 280 of the Record. Even after Local No. 9 was affiliated with the C. I. O., it had not made up its mind not to be bound by the Agreement. It only so decided "in the last few days" preceding the Representation hearings (R. 280). And it is to be noted (R. 404 note 5) that this was indeed one of its original thoughts. Moreover, Mr. Molthen, the Local No. 9 attorney, even knew of the so-called supplemental agreement and signed it (R. 271).

Can the Truce Agreement, despite the above, be inter-

preted as the Board and court indicate? The record conclusively indicates *Local No. 9 knew, before the execution of the Agreement, it might leave the A. F. of L.* (R. 252, 273). In May 1937, it contemplated leaving—there was only a "possible" chance of remaining. *Yet in the Truce Agreement thereafter executed, it made no attempt to protect itself in such event, because it nevertheless intended to abide by it.* It so testified (R. 273, 280).

Thus it is apparent the Board and the court have gone to unprecedented lengths in holding the Truce Agreement binding only if Local No. 9 remained in the A. F. of L. *Rather than that none of the parties intended the Truce Agreement to be binding in such case, in fact all of the parties intended the Truce Agreement to be binding in such case, including Local No. 9.* Its reason for not abiding by the Truce Agreement was, and only was, the legal contention that having left the A. F. of L. before the decision at the Denver Convention, it "could not be bound by any decision of a group of people who we were not a part of would make" (R. 274, 210), despite the fact it had, until a few days before the Representation hearings, felt differently. *Indeed, in fact, it formed Local No. 9 to avoid the effects of what it guessed would be an adverse decision of the A. F. of L.* This was the uncontradicted testimony of Local No. 9 witnesses (R. 358).

Groner, C. J., dissenting below, held that the proper interpretation of the Truce Agreement was as McKesson interpreted it.[4]

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[4] To refer to the Supplemental Agreement as supporting the Board's and the court's interpretation is singular. McKesson did not know of such agreement. Moreover, nothing is so clear as that, where a condition exists which might affect the performance of a contract and such condition is known to the parties, who make no exception therefor, the parties are presumed to intend that the occurrence of the condition, if it occurs, shall not operate to affect the performance of the contract. See 12 American Jurisprudence page 935; Williston on Contracts, Rev. Ed., Volume 6, page 5476,

As has been heretofore noted, each McKesson employee approved the Truce Agreement and agreed to be bound thereby, a step entirely meaningless if the court's interpretation aforesaid is correct. This Court has said in *N. L. R. B.* v. *Jones & Laughlin Steel Corp.* (1937), 301 U. S. 1, 57 Sup. Ct. 615, 81 L. Ed. 893, as follows (p. 44):

> "The provisions of Sec. 9(a) that representatives, for the purpose of collective bargaining, of the majority of the employees in an appropriate unit shall be the exclusive representatives of all the employees in that unit, imposes upon the employer only the duty of conferring and negotiating with the authorized representatives of its employees for the purpose of settling a labor dispute * * * (Referring to the case of Virginian Railway Co. *v.* System Federation No. 40, 300 U. S. 515) * * * we said (therein) 'that the obligation to treat with the true representative was exclusive and hence imposed a negative duty to treat with no other.' We also pointed out that, as conceded by the Government, the injunction against the Company's entering into any contract concerning rules, rates of pay and working conditions except with a chosen representative was 'designed only to prevent collective bargaining with any one purporting to represent employers' other than the representative they had selected. It was taken 'to prohibit the negotiation of labor contracts generally applicable to employees' in the described unit with any other representative than the one so chosen, 'but not as precluding such individual contracts' as the Company might 'elect to make directly with individual employees.' We think this

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citing cases; *Chicago, Milwaukee & St. Paul Railway* v. *Hoyt, et al.*, 149 U. S. 1, 13 Supreme Court 779.

Even more singular is the fact that such interpretation is predicated upon the assumption Longshoremen left the A. F. of L. This assumption is erroneous. Longshoremen never did leave the A. F. of L., although some of its locals did. There was a matter of jurisdiction to be arbitrated and it was, before the A. F. of L. Convention held in Denver in October 1937 as between Longshoremen, still members of the A. F. of L., and Teamsters.

construction also applies to Sec. 9(a) of the National Labor Relations Act."

By this statement, it has been definitely determined that individual contracts with employees are not void, and that the provisions of the Act do not preclude an employer from making such contracts with his employees. They become so, only if a consequence of unfair labor practices or if they in themselves thwart any policy of the Act. See *National Licorice Co.* v. *N. L. R. B.* (1940), 309 U. S. 350, 361, 60 Sup. Ct. 569; *Williams Mfg. Co., et al.* v. *United Shoe Workers of America, Local 119* (1937—Court of Common Pleas, Ohio), 1 Labor Cases 278. The contract signed by each employee here was not a consequence of unfair labor practices. It thwarted no policy of the Act. Rather, as has been demonstrated, it best served the purpose of the Act. And it was, further, entered into with the consent of the unions representative of the individual employees. To disregard it is to disregard this Court's decision in *N. L. R. B.* v. *Jones and Laughlin Steel Corp., supra.*

**2. In enforcing an order that penalizes an employer for living up to a voluntary written agreement between itself, two disputing unions and all the employees involved, the United States Court of Appeals for the District of Columbia erroneously decided a question of substance relating to the construction of the National Labor Relations Act, which has not been, but should be, settled by this Court. Further, such enforcement has the direct effect of defeating the principal purposes of the Act, which was "to avoid industrial strife by providing an orderly process of settling controversies."**

In effect, much of what has been heretofore under the aforesaid reason argued, is here applicable. Affirmance of the Board's order is to require McKesson to pay to each of the discharged men unearned wages since January, 1940.

It is to require McKesson to reopen once again the entire controversy. Affirmance, under these circumstances and in these conditions is ruinously punitive, not remedial. It has been judicially declared by this Court in *Consolidated Edison Co., et al.* v. *N. L. R. B.* (1938), 305 U. S. 197, 59 Sup. Ct. 206, that the power of the Board to command affirmative action is remedial, not punitive. Here, especially in circumstances wherein the Board itself has admitted that the parties' legal rights and obligations have been involved in doubt and McKesson's action to have been predicated upon an honest reliance on what it has always conceived to be the proper interpretation of the Truce Agreement, it is obvious the order is punitive. The court below in refusing to condition its enforcement of the order upon a new election demonstrating Teamsters not to be the choice of McKesson's employees has at least failed to adjust its relief to the exigencies of this case in accordance with the equitable principles governing judicial action. *Ford Motor Co.* v. *N. L. R. B.* (1938), 305 U. S. 364, 59 Sup. Ct. 301.

That enforcement will defeat the purpose of the Act, and rather than avoiding industrial strife, will reopen same, is easily demonstrated. The date the hearing on unfair labor charges began was September 19, 1938, some seven months after the election. During that entire time McKesson's employees had employment, and no difficulties with the Company (R. 109, 123, 151). The testimony thereunto is uncontradicted. It proves beyond question the employees made the choice they desired and were happy to abide by it. From September 19, 1938, to date, the records of the Board are bare of any problems arising between McKesson-Stewart and its employees, a rather singular thing in view of the intense struggle preceding the execution of the closed shop contracts. The employees have then continued happy in their choice. In this connection, events at the West Coast Wholesale Drug Co., subsequent to the election

held in February, 1938, and resulting in the Teamsters proving their right to represent the employees must be recalled. It follows the present denying to Teamsters of the right of representation of "any" of McKesson's warehouse employees (R. 528; 1 (c) of Order) is, if not unlawful, at least a reopening of this entire controversy. To reinstate men, known to be C. I. O. members, in the face of a closed shop agreement with an A. F. of L. local operative since November 15, 1937, which agreement McKesson is required to cease giving effect to (R. 528; Order 1 (b)) is, either a nugatory act, as where the employees desire to continue to be A. F. of L. members, or, if they do not, necessarily an invitation to the renewal of the controversy now since November 15, 1937, at rest.

**3. In upholding the order of the Board herein the United States Court of Appeals for the District of Columbia has sanctioned such an arbitrary and unlawful exercise of power on the part of, and course of procedure by, the Board, as to call for an exercise of this Court's power of supervision.**

The earliest action herein alleged to be unfair is the distribution by McKesson, at the request of Teamsters, to its employees at both the McKesson-Stewart and Blumauer Frank divisions on October 27, 1937, of copies of a letter signed by W. L. Glazier, Secretary-Treasurer of the Teamsters' Union (R. 509, 515), informing them that, at the October Convention of the A. F. of L., jurisdiction over warehousemen of the character here involved, had been granted to Teamsters (the letter appears in the record at pages 438-9) and stating that the employees would be expected to live up to the terms of the Truce Agreement signed by them, and that they should make application for membership in Teamsters. All other action is as of a later date, namely, the signing of the two "labor relations schedules" (closed shop agreements) on November 15, 1937

(R. 510), the handing to each employee of the so-called Van Vaerenwyck letter with its enclosure of a membership application card to Teamsters on the same day (R. 510); the demanding on November 16, 1937, at McKesson-Blumauer, of the signed application cards for membership in Teamsters, its closing down that day, and the offering to four McKesson-Blumauer employees of employment at McKesson-Stewart if they joined Teamsters (R. 511-512); and the keeping from work of McKesson-Stewart employees on November 17, 1937 (R. 513). The Representation hearings were held on November 18 through November 22, 1937. In such hearings, as has heretofore been shown, and as the Board itself noted in its "Decision and Direction of Elections", and in its amendment thereto, full evidence of all of the foregoing was presented. Indeed, but one day later than the close of the hearings, namely on November 23, 1937, Local No. 9 actually filed the complaints of unfair labor practices here in question and based upon all of the foregoing. Thus the Board necessarily considered all of such action when it fixed, for the election it directed, an eligibility date as of "the payroll period next preceding October 28, 1937." *Such date was precedent to any action herein.* The election was ordered with the full knowledge on the part of the Board that McKesson had signed closed shop agreements with Teamsters, and with the Board fully informed of all the facts on which it acted herein. It was obviously the purpose of the election to determine which of the unions represented the majority of the men. There is here no charge nor evidence of coercion of the electorate on the part of McKesson or Teamsters. Local No. 9 fully participated therein. The election was conducted by the Board, and McKesson took no part therein. No one claims it was not fairly held or determined. The Regional Director, in spite of the pending complaints before him, recommended action upon the strength of the election. All this being so,

what justification is there for the Board's course here, for it ruling it to be clear that the election could not be deemed determinative of the desires of the employees as of a date prior to November 15, 1937 (R. 521). Upon what can this ruling be based? What rhyme or reason is there in first ordering an election after demonstrably careful thought, and holding it, and then ignoring its results? It is submitted that the Board here has adopted such an arbitrary and unprecedented course of procedure in administering the Act, which procedure the court below has sanctioned, as to call for the exercise of this Court's power of supervision. This can be clearly and easily demonstrated, as follows:

a. The Board has said it "attempts to hold an election at a time when the balloting will accurately reflect the untrammeled desires of the employees", and consequently if it finds unfair labor practices "it usually postpones the election until some future time after its decision, when the effects of the unfair labor practices will have been dissipated." National Labor Relations Board, 4th Annual Report, p. 77. With a record before it replete with evidence possibly supporting charges of coercion, intimidation, discrimination, unfair discharges, etc., the Board did not see fit here to postpone the election indefinitely or for a time sufficient, in its opinion, to allow the effects, if any, therefrom to become dissipated. Why? Because it chose, as an eligibility date for determination of voters, a date preceding all such acts, so that the voice of the employees would be unimpaired by their effects. Because again the longer the election was delayed, the more fixed might become the status created by such acts, if unfair, and the harder to correct. But it did see fit to disregard the results of such election when, to its surprise, they were different than it supposed they would be.

b. Where Representation Cases have also involved allegedly unfair labor practices, and Local No. 9 introduced testimony as to the foregoing obviously directed towards this end, and the Board has found that such practices existed, it has frequently, in addition to postponing the election ordered such other action as it deemed necessary or appropriate. If the Board, on the record before it, had felt the schedules and discharges were improper, it could have ordered that McKesson then cease their enforcement, and reinstate the employees in question. (See in the *Matter of Williams Manufacturing Company et al.*, 6 N. L. R. B. 135.) Why then was no other action herein ordered by the Board? Why then did the Board not order McKesson to cease enforcing the schedules and to reinstate employees? Why did it only order an election? Because in this case, the practices in question now alleged to be unfair, might have been proper and legal, if, as indeed proved to be the case, as of the date thereof, Teamsters was the chosen representative of a majority of the employees. Because, if as of the date of the signing of the closed shop agreements, it was indeed true that Teamsters had the majority, these acts were legal and of no consequence herein. And, because in this case, these practices might have been not only proper, but required, by the terms of the Truce Agreement. In other words, not only does an election effectively dispel doubts as to the present wishes of employees, it also dispels doubts as to whether their past wishes were freely expressed or improperly influenced. See *United Shoe Workers of America Local 132, et al.* v. *Wisconsin Labor Relations Board, et al.* (Wis. Circuit Court, Dane County, decided December 24, 1937 (see 1 Labor Cases (C. C. H.) 334), modified and affirmed in 227 Wis. 569, 279 N. W. 37 (1938), where the court states:

> (p. 335): "Justice may point to an election as the fairest and most unequivocal means of determining the

> desires of the majority. *An election would dispel the suspicion that it was the employer's past practices,* held by the Board to be unfair, *which had an influence in attaining the AFL majority* and that the majority therefore may not be a true majority." (Italics added.)

Yet when the results of the election were known, when it demonstrated these practices were all legal and proper, under the proviso of section 8 (3) of the Act, the Board chose to disregard it. In this connection, the following quotation is so appropos that it must be cited. *Stewart Die Casting Corp.* v. *N. L. R. B.* (1940) (C. C. A. 7th), 114 F. (2d) 849 (2 Labor Cases 909),

> *Page 859:*
>
> "We are not unmindful of the familiar argument advanced by the Board that a fair election cannot be had until the last vestige of unfair labor practice has been removed as required by the Board's order. In other words, so it is argued, the unfair acts on the part of the employer create in the employee a state of mind which prevents a free expression of opinion on his part. To us this argument is imaginary rather than real. In fact, the opposite effect, if any, would be the natural result. We accord to the ordinary employee intelligence such as will enable him to show when he is being imposed upon by his employer, as well as the ability to properly protect his own interest in an election conducted by secret ballot, for the purpose of determining whom he desires as his bargaining agent."

c. It has already herein been demonstrated how, for the purposes of the election, the Board had held that all the warehouse employees of McKesson-Blumauer were entitled to vote, an order which heavily and unduly favored Local No. 9. Obviously, therefore, if the election was close and had been won by Local No. 9, and since the complaining McKesson-Blumauer employees comprised 15 of a total of 63 eligible voters and 15 of the 27 votes cast for Local

No. 9, it would have been proper to object to certification of Local No. 9 by pointing out that the votes of these temporary, and not to be retained, employees, had turned the election with the result that the true wishes of the to-be-retained McKesson-Stewart employees had been disregarded. As the Board has said in *Southern California Gas Company* (1939), 10 N. L. R. B. 1123, at 1142,

> "It would not be fair to permit temporary employees to participate in the choice of bargaining representatives where their period of employment with the company has been extremely short or intermittent or has not been recent."

Yet, despite such action by the Board, made without according McKesson an opportunity to object thereto, and its failure to turn the tide of ballots against Teamsters, still the Board refused to recognize the results of the election. It even went further. Despite its knowledge of events as they took place at West Coast Wholesale Drug Company, despite its Regional Director's recommendation that Teamsters be certified, it held McKesson guilty of unfair labor practice, and this, even without conditioning its order upon another election being held and so proving or disproving Teamsters' present majority.

McKesson therefore confidently submits that the Board here has unfairly and arbitrarily sought to exercise its powers under the Act (See dissenting opinion of Groner, C. J.). With all the evidence before it the Board ordered an election held to resolve the very question here involved, namely, the right of McKesson to do the very things alleged herein to be unfair. It was an election by secret ballot, so that the voting could be free. It was an election held fairly and impartially, and the results thereof resolved the entire question here presented, by proving that, as of a date preceding the alleged unfair labor practices, they were legal and proper, because Teamsters then represented a majority

of the McKesson employees. These results cannot be disregarded. The election must be given force or effect. How, after the results of the election were known, could it have been charged here by the very Regional Director, who had certified to the contrary, that at the time of signing the closed shop agreements Teamsters represented practically no employees? What else did the election determine, if not to the exact contrary? McKesson submits that rarely is a case presented to a court so baffling as to its purposes, as is this case. Local No. 9 had been defeated in its attempts to prove that it was the proper bargaining agency for McKesson's employees. The procedure adopted here permits no other conclusion but that the Board desired to give to Local No. 9 another opportunity whereby it might yet be made bargaining agent, the first having failed. Such action should not be countenanced by this Court. As broad as are the powers of the Board, yet an abuse of procedure is not beyond the power of the courts to restrain. *N. L. R. B.* v. *Jones & Laughlin Steel Corp., supra,* at page 46, and *United Baking Company, Inc.* v. *Bakery & Confectionery Workers' Union, Local 221* (1939), 170 Misc. 199, 9 N. Y. S. (2d) 964, affirmed 257 App. Div. 501, 14 N. Y. S. (2d) 74.

**4. In holding the closed-shop agreements of November 15, 1937, invalid, and the actions taken thereunder as unfair labor practices, the decision of the United States Court of Appeals of the District of Columbia is in conflict with the decision of the Circuit Court of Appeals for the Sixth Circuit in N. L. R. B. v. Electric Vacuum Cleaner Co., Inc. (June 6, 1941), 120 F. (2d) 611, and the decision of the United States Court of Appeals for the Fifth Circuit in Peninsular & Occidental Steamship Company v. N. L. R. B., et al., 98 F. (2d) 411, Cert. Den. 305 U. S. 653, 59 Supreme Court 248.**

Whether a closed shop agreement is valid or not depends upon whether the circumstances of its execution comply with

the conditions prescribed in Section 8 (3) of the Act. They are that the labor organization with which the agreement is made shall be one which is (1) not established, maintained, or assisted by an unfair labor practice and (2) the representative of a majority of the employees in the appropriate unit covered by the agreement "when made." *International Association of Machinists* v. *N. L. R. B.* (1940), 311 U. S. 72, 61 Supreme Court 83. No question is here presented concerning the appropriateness of the unit. Nor is there any as to the freedom of Teamsters from domination by McKesson. The only issue is whether Teamsters represented a majority of the McKesson employees at the date the contract was made. If it did, the contract was valid, and action thereunder legal. The Board found, and this was confirmed by the Court, no such majority.

In contending there was such majority in fact, McKesson has already noted that the election held by the Board in February, 1938, from employees as of a date prior to November 15, 1937, disclosed that such majority existed. As the Board noted, Local No. 9, despite the Truce Agreement, had undertaken to secure authorization cards from the employees in September, 1937. But then came the decision of the A. F. of L. Convention, and many employees who had signed such cards thereafter joined Teamsters (5 N. L. R. B. p. 85). "This indicated", said the Board, "the possibility of a change in the (employees') desires • • • concerning representation • • • there (was) doubt as to the present desires of the employees" concerning the same (5 N. L. R. B. p. 85). To resolve the doubt, an election was ordered to indicate the free and uninfluenced choice of the employees, and it indicated Teamsters as the choice of a majority of McKesson's employees, as of a date precedent to the execution of the closed shop agreements. It follows the closed shop agreements were valid, as was all action taken to put them into effect. *N. L. R. B.* v. *Lion Shoe Company* (C. C. A. 1st 1938), 97 F. (2d) 448.

In contending further that there was such majority in fact, McKesson has heretofore also noted that such closed shop agreements were in fact entered into because of, and were indeed required, by the terms of the Truce Agreement, the treatment heretofore being primarily as to its proper interpretation. The contention here made, and one that was also made before the court, is somewhat different. It is that, even if the election cannot relate back to a date prior to October 28, 1937, so as to validate all action thereafter taken, the closed shop contracts relied upon are not the November 15, 1937 contracts, but the Truce Agreement itself, which was signed by all the McKesson employees.

In support of this contention, it is to be noted Section 8 (3) does not specify the time at which the consent of the majority may be shown. The statute merely provides that the consent must be effective when the closed shop agreements are made. Here the consent was manifested in the Truce Agreement, already demonstrated to be a valid and enforceable agreement. It was the consent of all the employees, whether members of Local 38-117 of Longshoremen, or of Teamsters. It was a consent designed to solve a jurisdictional controversy. *And in effect it was a joint closed shop agreement between the two contending unions, freezing the status until the determination therein provided for could be had.* Such an agreement, while rare, is not unique. Recently a strike settlement was negotiated under the auspices of the Board, among employees of the E. F. Hauserman Company, at Cleveland, Ohio. Such settlement provided for the employees to be members of either a named A. F. of L. or C. I. O. union, for the plant to open, and for the A. F. of L. to retain its status as sole bargaining agency until a date stated, when a new election would be conducted by the Board to determine the new representative. In the contract effecting such settlement, the C. I. O. union withdrew charges of interference, discrimination and refusal to

bargain filed with the Board, and the employer withdrew a petition for an election and agreed to sign a contract with the certified union. (See Labor Relations Reporter Volume 8 No. 9, April 28, 1941, page 267.)

This, it is contended here, was the meaning of the Truce Agreement. Every employee was a union member, of Local 38-117, or of Teamsters. The fact that practically all employees voted in the election proves this. Every employee returned to work under his then union affiliation, and agreed to be bound by the decision of the A. F. of L. Convention as to jurisdiction. Suits then pending were dismissed. However jurisdiction was finally awarded, the employees agreed to accept same—that is, to apply for membership in the proper union having jurisdiction over them. This is the meaning of, and the only meaning possible for, this Truce Agreement effected between employees, all union members. And if this be so, the Truce Agreement is, of course, valid, because signed by all the employees when made.

In this connection, McKesson calls to the attention of the Court the recent case of *N. L. R. B.* v. *Electric Vacuum Cleaner Co., Inc.*, 120 F. (2d) 611, decided by the United States Circuit Court of Appeals for the Sixth Circuit on June 6, 1941. The case decides that section 8 (3) is not limited to the standard accepted form of closed shop agreement. It does not prohibit mutual cooperation between parties. The express purpose of the Statute was the establishment of industrial peace, and the proviso of Section 8 (3) was enacted to give the employer an opportunity of dealing in an orderly fashion with one organization only, instead of with various conflicting organizations. If industrial peace requires contract with two organizations, rather than one, such a contract is encompassed within the scope of the proviso. And the Board has so recognized in the E. F. Hauserman Company settlement.

But even if the Truce Agreement is not a closed shop agreement that stands or falls upon the question of whether a majority of employees agreed thereto at the time it was made, as all did, it has been shown it required the execution of the closed shop contracts on November 15, 1937, to which execution the employees, *in advance, had contracted* to give their consent. Will such a consent, effective when the contract is made, satisfy the proviso of section 8 (3) and will such a contracted consent, supported by ample consideration, granted for a time certain, continue effective despite attempted revocation by the majority? These now become the questions to be considered.

That stability in industrial relations requires recognition of consent granted prior to, but effective at the time of the execution of, a closed shop agreement, provided the time elapsing be not unreasonably long, is obvious. If this should not be so, then any labor contract entered into today has no meaning tomorrow, if another union may come along and, claiming it can obtain better employee treatment, cause the employees to change their affiliation. The consent here required was not for an unreasonable length of time. The Convention was to be held in October, only four months from the execution of the Truce Agreement. Moreover, the *status quo* was frozen in the interim, so that the employees' bargaining rights were not to be prejudiced. And if operating under such consent a closed shop agreement is entered into, it is valid, as is action thereunder. This is in effect the holding of *N. L. R. B.* v. *Electric Vacuum Cleaner Co., Inc., supra,* wherein authorizations for representation given unions by employees, to be effective for one year and thereafter, subject to thirty days' notice of withdrawal, were held legal in every respect, reasonable as to term, effective until withdrawn, and effective to support action taken thereunder. The signing the authorizations entitling the men to the benefits of union membership, including the benefits

of a labor contract, in turn was held to require the binding of the men at least during the term of the authorization, not to disrupt the contract entered into on the strength of such authorizations. Here, similarly, the employees bound themselves by the Truce Agreement to continue to keep their consent effective. It was effective on November 15, 1937, and the closed shop contracts were valid.

The Board has indeed itself held that the proviso of section 8 (3) applies equally to a preferential employment contract, as to a closed shop contract. *J. E. Pearce Contracting and Stevedoring Co. Inc.* (1940), 20 N. L. R. B. 1061. In *Peninsular & Occidental Steamship Company* v. *N. L. R. B. et al.,* (1938) 98 F. (2d) 411, cert. den. 305 U. S. 653, 59 S. Ct. 248, where there was a preferential employment contract, the Circuit Court of Appeals for the Fifth Circuit refused to uphold a charge of unfair labor practice based upon action taken pursuant to such contract while it still was in force.

Will consent, such as is here given, continue effective despite attempted revocation by a majority? Again it is obvious that stability in industrial relations so requires. If employees can change their minds at will, no labor contract is worth the paper it is written on. Both in *J. E. Pearce Contracting & Stevedoring Co. Inc., supra,* and in *Peninsular and Occidental Steamship Company, supra,* change in affiliation by a majority of employees during the term of the contract failed to affect the results. Similar holdings will be found in *M. & M. Wood Working Company* v. *Plywood & Veneer Workers Local Union No. 102* (1938) (U. S. D. Ct. Oregon), 23 Fed. Supp. 11, holding a closed shop agreement unaffected by change in affiliation of members of the local union; *M. & M. Wood Working Company, et al.* v. *N. L. R. B.* (1939) (C. C. A. 9th Circuit), 101 F. (2d) 938, wherein the court set aside the Board's order on the ground the discharges in question being in

compliance with a lawfully executed closed shop, were not discriminatory, even though a majority of membership of the contracting union subsequently withdrew and organized a new and previously nonexistent union; *Pennsylvania Labor Relations Board* v. *Red Star Repairing Co., Inc.*, decided on December 15, 1937 by the Pennsylvania Court of Common Pleas, No. 2, and reported in Volume 1 Labor Cases (C. C. H.) page 341, (exceptions dismissed 1 Labor cases (C. C. H.) page 668 on May 3, 1938); and *Matter of Triboro Coach Corp.*, 104 N. Y. L. J. 807, 22 N. Y. S. (2d) 1013, affirmed 27 N. Y. S. (2d) 83 and again affirmed by the New York Court of Appeals on July 29, 1941 (C. C. H. Labor Law Service, parag. 60, 640). These cases make it clear that to hold that a labor contract may be abrogated at any time at the will of a majority of workers thwarts the very purpose of labor legislation, makes the contract lacking in mutuality and reciprocity of obligation, and deprives those employees not desiring change of their property and contractual rights. What is more these cases are law in the State of Washington, whose law governs this Truce Agreement. *Local No. 2508, Lumber & Sawmill Workers Union, et al.* v. *Cairns, et al.*, 197 Wash. 476, 85 Pac. (2d) 1109 (1938); *Lumber & Sawmill Workers Union No. 2623, et al.* v. *International Woodworkers of America, Local No. 49, et al.*, 197 Wash. 491, 85 Pac. (2d) 1099 (1938).

One of the reasons for the court reaching the limited interpretation it gave to the scope of the Truce Agreement was that it had no definite term, whether in months or in years, and it could not be the employees intended to be forever bound. McKesson never so contended. It contended first that the employees bound themselves only to abide by the decision of the A. F. of L. Convention, and contracts entered into pursuant to such decision, as any other, would be binding only for such period of time, in cases of change of affiliation, as the Board, subject to re-

view by the Courts, determined was necessary, balancing the needs of industrial stability with as full a recognition of employee rights as was possible. Even more important, McKesson respectfully submitted to the court, and here respectfully submits, that it has never been required herein to contend that the Truce Agreement was necessarily always binding and in all circumstances. McKesson can admit, for the purposes hereof, that the employees signing the Truce Agreement were not thereby barred *at any time* from changing their minds, and if a majority thereof so did, *from requesting the Board so to certify and to annul the Agreement,* thereby making it impossible for McKesson to carry out the agreement. All McKesson here is required to contend, as it fully believes must be the law, is that the Truce Agreement was valid and binding upon it, and that it was required to abide thereby, *until such time as the Board, for any reason it saw fit, ordered it to cease giving any effect thereto by virtue of the powers granted to it by the Act; and that, until the Board so ruled, all action pursuant thereto, inclusive of the action herein complained of, could not be an unfair practice.* And there was ample time herein for the employees, if indeed they desired to change their representative and no longer to abide by the terms of the Truce Agreement, to take action before the Board thereunto. Long prior to October 28, 1937, when Local No. 9 filed its Representation petitions, said date being a date after the decision of the A. F. of L. Convention had fixed obligations under said Truce Agreement, it could have in fact filed its petitions, and made it legally impossible, if such is the law, for McKesson to abide thereby. Not doing so, it cannot be that McKesson, in abiding thereby, can be guilty of unfair labor practice. This position has been recently stated with overwhelming force in *Matter of Triboro Coach Corp., supra.*

**5. In holding the discharges herein improper, the United States Court of Appeals for the District of Columbia has failed to give proper effect to the decision of this Court in N. L. R. B. v. The Sands Mfg. Co. (1939), 306 U. S. 332, 59 Supreme Court 508.**

In *N. L. R. B.* v. *The Sands Mfg. Co.* (1939), 306 U. S. 332, 59 Supreme Court 508, this Court has held specifically that the Act does not prohibit an effective discharge for repudiation by an employee of his agreement. See *N. L. R. B.* v. *Electric Vacuum Cleaner Co., Inc., supra.* There can be no doubt the discharges herein in question were for the sole reason the employees refused to abide by the terms of the Truce Agreement and join Teamsters. And when the complaining witnesses herein refused to abide by the Truce Agreement, when they irrevocably repudiated the same, McKesson was at liberty to treat them as having severed their relations with the company and to replace them with others, as it did. See also *N. L. R. B.* v. *Columbian Enameling & Stamping Company, Inc.*, 96 Fed. (2d) 948 (C. C. A. 7th 1938), affirmed (1939) 306 U. S. 292, 59 Supreme Court 50.)

Respectfully submitted,

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